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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE for the First Collection District of Pennsylvania, petitioner

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Pennsylvania (R. 22) is reported in 60 F. (2d) 333. The opinion of the Circuit Court of Appeals (R. 33) is reported in 63 F. (2d) 258.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 6, 1933 (R. 34), and a petition for rehearing denied on March 11, 1933 (R. 36). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the failure to substitute a Government officer as party plaintiff in a suit on a bond for the benefit of the United States within the six months' period prescribed by Section 11 of the Act of February 13, 1925 (*infra*, p. 9), abate not only the immediate suit but also preclude a new suit on the bond by a successor in office?

STATUTE INVOLVED

Section 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, is printed in the Appendix, p. 9, *infra*.

STATEMENT

On March 18, 1931, James S. MacLaughlin, Collector of Internal Revenue for the First Collection District of Pennsylvania, brought suit in the District Court of the United States for the Eastern District of Pennsylvania against the Philadelphia Barge Company and the National Surety Company to recover the sum of $12,635, with interest and costs (R. 3–8). The suit was founded upon a bond dated February 17, 1921, whereby the Barge Com-

pany, as principal, and the Surety Company, as surety, obligated themselves to Ephraim Lederer, Collector of Internal Revenue, "or his Successors", for the payment of so much of the amount claimed of the income taxes assessed against the Barge Company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue (R. 6–7). It was alleged by the plaintiff that he was one of Lederer's successors in office and as such brought the suit upon the bond (R. 5).

Respondents filed an affidavit of defense in which was incorporated, *inter alia,* a plea that the cause of action had "been lost" by failure to comply with the provisions of Section 11 of the Act of February 13, 1925, *infra,* p. 9 (R. 11–19). This plea recited (R. 18) that in August, 1926, one Blakely D. McCaughn, a former Collector, had sued upon the same bond; that judgment was awarded McCaughn for want of sufficient affidavit of defense; that McCaughn resigned as Collector on December 31, 1927; that on December 13, 1930, a suggestion was filed in that case by the defendants (respondents herein) that the cause of action had abated under the provisions of Section 11 of the Act of 1925, because no substitution had been made of McCaughn's successor as party plaintiff within the six months' period prescribed by that Act; and that on December 22, 1930, the court entered an order striking the judgment from the record upon the

ground that the action had abated prior to the entry of the judgment (R. 18).

Upon a motion for judgment for want of a sufficient affidavit of defense (R. 19–21), the District Court sustained the plea in abatement contained in such affidavit and entered judgment for the respondents herein * (R. 22–24, 25). Although the District Court said that it assumed that MacLaughlin would have been the proper party to sue on the bond if no prior suit had been brought by McCaughn, it held that because there had been such a suit the failure of the Government to cause substitution to be made, after the plaintiff had left office, of his successor or successors, in compliance

* Prior to the entry of judgment in the District Court, the United States Attorney filed a suggestion of the death of MacLaughlin and requested the substitution of Albert H. Ladner, present Collector of Internal Revenue, as party plaintiff (R. 24–25). While no formal order of substitution appears in the record, an exception to the judgment was taken on behalf of Ladner (R. 26), the appeal to the Circuit Court of Appeals was applied for in his name (R. 27, 30), and his name appears as the party appellant in all of the proceedings in that court (R. 33 et seq.). The record does not show the date of MacLaughlin's death, but we are advised by the Bureau of Internal Revenue that he died on June 11, 1932. As the suggestion of death was filed on July 20, 1932 (pp. 24–25), it was within the six months' period prescribed by the Act of 1925. The United States Attorney advises that "the substitution of Ladner as plaintiff in lieu of Joseph S. MacLaughlin, upon the death of the latter, is strictly in accord with the Pennsylvania practice, and an order of the Court for the same is not necessary. The attorney for the deceased party merely files the suggestion on the record and notifies the other party."

with the Act of 1925, resulted not only in the abatement of that suit but also of the Government's cause of action upon the bond. The court said that if this was not so "the abatement could be avoided and the Act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector," and that "In addition there is no injustice in refusing to permit parties to be harrassed by the necessity of defending more than one suit for the same cause of action when a very simple procedure is offered for the continuance to a conclusion of the action as originally brought" (R. 23–24). Upon appeal the judgment of the District Court was affirmed by the Circuit Court of Appeals for the Third Circuit in a *per curiam* decision (R. 33).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In sustaining the judgment of the District Court that the affidavit of defense was sufficient because the cause of action had abated.

2. In holding that the cause of action had abated by reason of failure to substitute the respective successive Collectors from time to time in accordance with the provisions of the Act of February 13, 1925.

REASONS FOR GRANTING THE WRIT

We submit that the courts below have misconstrued Section 11 of the Act of 1925. As indicated in the cases referred to by this Court in its recent

decision in *Ex parte La Prade,* No. 21, Original, October Term, 1932, decided May 22, 1933, the sole purpose of that legislation was to obviate the inconvenience and delay which resulted from the abatement of suits involving public officers because of the death or resignation of such officers or their separation from the service. (See also House Report 960, 55th Cong., 2d Sess., p. 2.) It accordingly provided a procedure which, if followed, would eliminate the necessity of a new suit. But there is nothing in either the history or the wording of that legislation which does away with the right to bring a new suit, under appropriate circumstances, if the procedure outlined by the statute is not followed. Thus, where the successor of an officer who was the defendant in a case which has abated continues the alleged illegal official conduct which was charged against his predecessor, the right of the plaintiff to bring a new suit against the successor has never been doubted. (*United States ex rel. Claussen* v. *Curran,* 276 U.S. 590, cf. *United States ex rel. Claussen* v. *Day,* 279 U.S. 398; *Matheus, U.S. Marshal* v. *United States ex rel. Cunningham,* 282 U.S. 802, *cf. Fetters, U.S. Marshal* v. *United States ex rel. Cunningham,* 283 U.S. 638. See also *United States ex rel. Bernardin* v. *Butterworth,* 169 U.S. 600, 605, cf. *United States* v. *Duell,* 172 U.S. 576.)

If the failure to substitute in such a case does not preclude the bringing of a new suit, we are unable

to see why it should do so in a case like the instant one. The bond in this case ran to "Ephriam Lederer, Collector, First District, Pennsylvania, or his Successors" (R. 9). As was said by the Circuit Court of Appeals for the Second Circuit in *Bowers* v. *American Surety Company,* 30 F. (2d) 244, 246 (certiorari denied, 279 U.S. 865), "the purpose of such bonds is to create an obligation in behalf of the incumbents, as they succeed each other." By the terms of the bond and *virtute officii* the right to sue upon this bond devolved upon McCaughn's successor in office, MacLaughlin. By its admission that if McCaughn had not first brought suit, MacLaughlin's suit would have been good, the District Court correctly recognized that the right of action upon the bond survived McCaughn's resignation from office. But it then proceeds, illogically we submit, to decide that the failure to substitute MacLaughlin in McCaughn's suit not only destroyed that suit but also the cause of action upon the bond which it had previously recognized as surviving the passing of McCaughn from office. The statute is purely procedural and was clearly not meant to affect the rights and obligations of public officers if, as a matter of substantive law, they continue to exist after a suit by or against a former officer has abated. So to construe the statute is to extend it far beyond its obvious purpose.

Furthermore, the construction placed upon Section 11 of the Act of 1925 by the courts below has

the effect of imposing a time limitation upon the enforcement of rights accruing under bonds given to public officers to insure the collection of the revenue of six months after a change in office *pendente lite*—a result which Congress could hardly have intended.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

APPENDIX

Statute Involved

Act of February 13, 1925, c. 229, 43 Stat. 936, 941, (U.S.C., Title 28, Sec. 780):

Sec. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

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